

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ELROY W. BROWNING,

Plaintiff,

v.

JEANNE WOODFORD, et al.,

Defendants.

CASE NO. 1:05-CV-00342-AWI-LJO (PC)

ORDER REQUIRING PLAINTIFF TO EITHER
FILE AN AMENDED COMPLAINT OR
NOTIFY THE COURT OF HIS WILLINGNESS
TO PROCEED ONLY ON HIS EXCESSIVE
FORCE CLAIM

(Doc. 1)

I. Screening Order

A. Screening Requirement

Plaintiff Elroy W. Browning (“plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on March 11, 2005.

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

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1 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon
 2 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in
 3 support of the claim or claims that would entitle him to relief. See Hishon v. King & Spalding, 467
 4 U.S. 69, 73 (1984), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Palmer v. Roosevelt
 5 Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under this
 6 standard, the court must accept as true the allegations of the complaint in question, Hospital Bldg.
 7 Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light most
 8 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. Jenkins v. McKeithen, 395
 9 U.S. 411, 421 (1969).

10 B. Plaintiff's Claims

11 The events at issue in the instant action allegedly occurred at California State Prison-
 12 Corcoran, where plaintiff is presently incarcerated. Plaintiff names California Department of
 13 Corrections Director Jeanne S. Woodford, Warden A. K. Scribner, D. D. Sheppard-Brooks, S.
 14 Grandy, C. Castro, C. L. Jackson, and M. Lopez as defendants. Plaintiff is seeking money damages.

15 Plaintiff alleges that on April 1, 2004, defendants Castro, Jackson, and Lopez used excessive
 16 force against him when they pepper sprayed him for no reason and then subjected him to a hot
 17 shower rather than a cold shower as they should have. Plaintiff alleges that defendants Sheppard-
 18 Brooks and Grandy responded to his inmate appeal, finding his complaint against staff was
 19 unfounded and depriving him of an interview. Plaintiff alleges claims for relief for violation of the
 20 Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. In addition, plaintiff
 21 asserts that defendants conspired, that the incident was racially motivated, and that the incident
 22 violated California Penal Code Sections 13870 and 13872, although plaintiff does not specifically
 23 plead claims for relief beyond the Eighth Amendment and Due Process Clause claims.

24 1. Claims Against Defendants Castro, Jackson, and Lopez

25 a. Excessive Force Claim

26 _____ "Whenever prison officials stand accused of using excessive physical force in violation of
 27 the Cruel and Unusual Punishment Clause [of the Eighth Amendment], the core judicial inquiry is
 28 . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously

and sadistically to cause harm.” Hudson v. McMillian, 503 U.S. 1, 7 (1992) (citing Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). “In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between the need and the amount of force used, the threat ‘reasonably perceived by the responsible officials,’ and ‘any efforts made to temper the severity of a forceful response.’” Hudson, 503 U.S. at 7. “The absence of serious injury is . . . relevant to the Eighth Amendment inquiry, but does not end it.” Id.

“What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishment Clause depends upon the claim at issue” Id. at 8. “The objective component of an Eighth Amendment claim is . . . contextual and responsive to contemporary standards of decency.” Id. at 8 (quotations and citations omitted). With respect to excessive force claims, the malicious and sadistic use of force to cause harm *always* violates contemporary standards of decency, regardless of whether or not significant injury is evident. Id. at 9; see also Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002) (Eighth Amendment excessive force standard examines de minimis uses of force, not de minimis injuries)).

Plaintiff’s allegations are sufficient to give rise to a claim for relief under section 1983 against defendants Castro, Jackson, and Lopez for use of excessive force. Fed. R. Civ. P. 8; Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512-15 (2002); Austin v. Terhune, 367 F.3d 1167, 1171 (9th Cir. 2004); Jackson v. Carey, 353 F.3d 750, 754 (9th Cir. 2003); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1125-26 (9th Cir. 2002).

b. Conspiracy Claim

In the context of conspiracy claims brought pursuant to section 1983, such a complaint must “allege [some] facts to support the existence of a conspiracy among the defendants.” Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992); Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 626 (9th Cir. 1988). Plaintiff must allege that defendants conspired or acted jointly in concert and that some overt act was done in furtherance of the conspiracy. Sykes v. State of California, 497 F.2d 197, 200 (9th Cir. 1974). Because plaintiff has not alleged any facts

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supporting the existence of a conspiracy between defendants to violate his constitutional rights, plaintiff fails to state a conspiracy claim.

c. Due Process Claim

Plaintiff alleges that defendants' actions also violated the Due Process Clause. However, "[t]o establish a violation of substantive due process . . . , a plaintiff is ordinarily required to prove that a challenged government action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing a plaintiff's claims." Patel v. Penman, 103 F.3d 868, 874 (9th Cir. 1996) (citations, internal quotations, and brackets omitted), *cert. denied*, 117 S. Ct. 1845 (1997); County of Sacramento v. Lewis, 523 U.S. 833, 842 (1998). In this case, the Eighth Amendment "provides [the] explicit textual source of constitutional protection" Patel, 103 F.3d at 874. Therefore, the Eighth Amendment rather than the Due Process Clause of the Fourteenth Amendment governs plaintiff's claims.

d. Allegations of Racial Motivation

1) Equal Protection Claim

To the extent that plaintiff is attempting to pursue an equal protection claim, such claims arise when a charge is made that similarly situated individuals are treated differently without a rational relationship to a legitimate state purpose. See San Antonio School District v. Rodriguez, 411 U.S. 1 (1972). In order to state a § 1983 claim based on a violation of the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must show that defendants acted with intentional discrimination against plaintiff or against a class of inmates which included plaintiff. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (equal protection claims may be brought by a "class of one"); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 740 (9th Cir. 2000); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998); Federal Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 471 (9th Cir. 1991); Lowe v. City of Monrovia, 775 F.2d 998, 1010 (9th Cir. 1985). "A

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plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights.” Barren, 152 F.3d at 1194.

Plaintiff’s conclusory allegation that defendants’ actions were racially motivated is insufficient to support an equal protection claim. Plaintiff has alleged no facts that indicate that defendants intentionally pepper sprayed him on the basis of his race.

2) Penal Code Sections

To the extent that plaintiff is attempting to pursue claims for relief based on the violation of California Penal Code Sections 13870 and 13872, plaintiff may not do so. Section 13870, which has been repealed in any event, simply sets forth legislative findings and intent concerning racial, ethnic, and religious crimes, and Section 13872 simply defines crimes within the chapter on racial, ethnic, and religious crimes. Neither section cited by plaintiff provides a basis upon which to impose civil liability on defendants.

2. Claim Against Defendants Sheppard-Brooks and Grandy

The Due Process Clause protects prisoners from being deprived of liberty without due process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order to state a cause of action for deprivation of due process, a plaintiff must first establish the existence of a liberty interest for which the protection is sought. “States may under certain circumstances create liberty interests which are protected by the Due Process Clause.” Sandin v. Conner, 515 U.S. 472, 483-84 (1995). Liberty interests created by state law are generally limited to freedom from restraint which “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Sandin, 515 U.S. at 484.

“[A prison] grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates.” Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993) (citing Azeez v. DeRobertis, 568 F. Supp. 8, 10 (N.D. Ill. 1982)); see also Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of appeals because no entitlement to a specific grievance procedure); Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) (existence of grievance procedure confers no liberty interest on prisoner); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). “Hence, it does not give rise to a protected liberty interest requiring the procedural protections envisioned by

1 the Fourteenth Amendment.” Azeez v. DeRobertis, 568 F. Supp. at 10; Spencer v. Moore, 638 F.
2 Supp. 315, 316 (E.D. Mo. 1986). Actions in reviewing prisoner’s administrative appeal cannot serve
3 as the basis for liability under a § 1983 action. Buckley, 997 F.2d at 495.

4 Defendants Sheppard-Brooks and Grandy responded to plaintiff’s inmate appeal grieving the
5 incident of force. Defendants’ involvement in the resolution of plaintiff’s inmate appeal provides
6 no basis for the imposition of liability under section 1983. Neither the finding that plaintiff’s
7 allegations were unfounded nor the failure to provide plaintiff with an interview is of constitutional
8 significance. Accordingly, plaintiff fails to state any claims upon which relief may be granted under
9 section 1983 against defendants Sheppard-Brooks and Grandy based on their involvement in
10 responding to his inmate appeal.

11 3. Claim Against Defendants Woodford and Scribner

12 Plaintiff names Director Woodford and Warden Scribner as defendants. Liability may not
13 be imposed on supervisory personnel under section 1983 for the actions of their employees under
14 a theory of respondeat superior. When the named defendant holds a supervisorial position, the
15 causal link between her and the claimed constitutional violation must be specifically alleged. See
16 Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir.
17 1978), cert. denied, 442 U.S. 941 (1979). To state a claim for relief under section 1983 for
18 supervisory liability, plaintiff must allege some facts indicating that defendants Woodford and
19 Scribner either: personally participated in the alleged deprivation of constitutional rights; knew of
20 the violations and failed to act to prevent them; or promulgated or “implemented a policy so deficient
21 that the policy ‘itself is a repudiation of constitutional rights’ and is ‘the moving force of the
22 constitutional violation.’” Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations
23 omitted); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Although federal pleading standards
24 are broad, some facts must be alleged to support claims under section 1983. See Leatherman v.
25 Tarrant County Narcotics Unit, 507 U.S. 163, 168 (1993).

26 Plaintiff has not alleged any facts that would support a claim that defendants Woodford and
27 Scribner personally participated in the alleged deprivation of constitutional rights; knew of the
28 violations and failed to act to prevent them; or promulgated or “implemented a policy so deficient

1 that the policy ‘itself is a repudiation of constitutional rights’ and is ‘the moving force of the
2 constitutional violation.’” Hansen v. Black at 646. Accordingly, plaintiff fails to state any claims
3 under section 1983 against defendants Woodford and Scribner.

4 C. Conclusion

5 The court finds that plaintiff’s complaint contains a cognizable claim for relief against
6 defendants Castro, Jackson, and Lopez for use of excessive force, in violation of the Eighth
7 Amendment. However, the court finds that plaintiff’s complaint does not contain any other claims
8 upon which relief may be granted. The court will provide plaintiff with the opportunity to file an
9 amended complaint, if plaintiff wishes to do so.

10 If plaintiff does not wish to file an amended complaint and wishes to proceed against
11 defendants Castro, Jackson, and Lopez on his Eighth Amendment claim only, plaintiff may so notify
12 the court in writing. The court will then issue Findings and Recommendations recommending that
13 the remaining claims and defendants be dismissed from this action, and will forward plaintiff three
14 summonses and three USM-285 forms to fill out and return to the court. Upon receipt of these
15 documents, the court will direct the United States Marshal to initiate service of process on
16 defendants Castro, Jackson, and Lopez.

17 In the event that plaintiff does wish to amend his complaint, plaintiff is advised Local Rule
18 15-220 requires that an amended complaint be complete in itself without reference to any prior
19 pleading. As a general rule, an amended complaint supersedes the original complaint. See Loux
20 v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original
21 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an
22 original complaint, each claim and the involvement of each defendant must be sufficiently alleged.

23 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions
24 complained of have resulted in a deprivation of plaintiff’s constitutional rights. See Ellis v. Cassidy,
25 625 F.2d 227 (9th Cir. 1980). The complaint must allege in specific terms how each named
26 defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless there is some
27 affirmative link or connection between a defendant’s actions and the claimed deprivation. Rizzo v.

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1 Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy,
2 588 F.2d 740, 743 (9th Cir. 1978).

3 Based on the foregoing, it is HEREBY ORDERED that:

- 4 1. The Clerk's Office shall send plaintiff a civil rights complaint form;
- 5 2. Within **thirty (30) days** from the date of service of this order, plaintiff must either:
- 6 a. File an amended complaint curing the deficiencies identified by the court in
7 this order, or
- 8 b. Notify the court in writing that he does not wish to file an amended complaint
9 and wishes to proceed only against defendants Castro, Jackson, and Lopez
10 on his Eighth Amendment claim; and
- 11 3. If plaintiff fails to comply with this order, this action will be dismissed for failure to
12 obey a court order.
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14 IT IS SO ORDERED.

15 **Dated: August 5, 2005**
16 b9ed48

/s/ Lawrence J. O'Neill
UNITED STATES MAGISTRATE JUDGE